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KENNETH J. MURPHY
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV CINCINNATI

DENNIS ALLEN, MARY JANE
CRACRAFT, LELAN LITTRELL and
GLASS, MOLDERS, POTTERY, PLASTIC
AND ALLIED INDUSTRIAL WORKERS,
LOCAL NO. 41, AFL-CIO,

Plaintiffs,

vs.

LEONARD D. KRISTAL, and JOHN L.
CRARY,

Defendants.

Case No: C-1-01-159

Judge Herman J. Weber
Magistrate Judge Timothy S. Hogan

DEFENDANT JOHN L. CRARY'S
OPPOSITION TO THIRD-PARTY
DEFENDANTS POLLY JONES' AND
SHIRLEY MONROE'S MOTION TO
CONTINUE THE DISPOSITIVE
MOTIONS DEADLINE ON THIRD-
PARTY CLAIMS ONLY

JOHN L. CRARY,

Cross-Claimant,

vs.

LEONARD D. KRISTAL,

Cross-Defendant.

JOHN L. CRARY,

Third-Party Plaintiff,

vs.

POLLY JONES, SHIRLEY MONROE,
JAMES THELAN,

Third-Party Defendants

Defendant John L. Crary, by and through his counsel, hereby respectfully submits his
Opposition to Third-party Defendants Polly Jones' and Shirley Monroe's motion to continue the
dispositive motions deadline on third-party claims only. This Opposition is based upon the

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DEFENDANT JOHN L. CRARY'S OPPOSITION TO THIRD-PARTY DEFENDANTS POLLY JONES' AND SHIRLEY
MONROE'S MOTION TO CONTINUE THE DISPOSITIVE MOTIONS DEADLINE ON THIRD-PARTY CLAIMS ONLY

Memorandum of Points and Authorities and all other pleadings and papers on file or to be filed in support of this Opposition and upon such other and further argument as may be presented at any hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On or about July 3, 2002, Plaintiffs filed their First Amended Complaint with this Court against Defendant John L. Crary ("Crary") alleging breach of fiduciary duty and prohibited transactions under ERISA. Crary moved to dismiss and, on April 3, 2003, Magistrate Judge Hogan issued his Report and Recommendation denying Crary's motion and holding that "*Plaintiffs must demonstrate what [Crary] knew and when he knew it and apply either the actual or constructive knowledge of Mr. Crary to each transaction engaged in by the Plan Administrator.*" Report and Recommendation page 5.

On or about April 16, 2003, Crary filed his third-party complaint for indemnity against the third-party defendants Polly Jones ("Jones"), the actual named Plan Administrator; Shirley Monroe ("Monroe"), Lassen's human resources director, who apparently knew all about Lassen's problems; and James Thelan ("Thelan"), Lassen's Controller, who also knew about Lassen's problems. On or about May 9, 2003, plaintiffs' attorney, representing Jones and Monroe, filed a motion to dismiss Crary's third-party complaint for failure to state a claim. Crary has opposed such motion since Crary can be found jointly and severally liable for all damages regardless of how little involvement he may have had.

The actual Plan Administrator for each of Lassen's several health plans was third-party defendant Polly Jones. In targeting Crary, plaintiffs apparently decided not to sue the actual Plan Administrator of the health plans at issue. And, in a rather unique development, plaintiffs' counsel now represents the actual Plan Administrator responsible for these plans and counsel's plaintiff/clients losses.

To complicate this further, Crary's counsel has been contacted by panel counsel for one of

1 Jones' insurers, who informed Crary's counsel that they would be substituting into this matter if
2 Jones's Motion to Dismiss is not granted. Thus, plaintiff's counsel's representation of Jones is
3 temporary at best.

4 Defendant Crary's counsel has discussed with plaintiff's/third party defendant's counsel the
5 possibility of moving the trial date in this matter to ensure that all party's, including third party
6 defendants, have adequate rights to discovery on all relevant matters and preparation for trial.
7 However, plaintiff's/third party defendant's counsel resisted any changes to this court's scheduling
8 order. Now plaintiff's/third party defendant's counsel seeks to cherry pick which dates to change.

9 II.

10 **THERE IS NO GOOD CAUSE FOR MOVING ONLY**

11 **THE DISPOSITIVE MOTIONS DEADLINE**

12 **WITH REGARD ONLY TO THIRD PARTY DEFENDANTS**

13 Federal Rules of Civil Procedure, Rule 16(b) provides in part that, "A schedule shall not be
14 modified, except upon a showing of good cause."

15 Third party defendants, in this motion, make no showing whatsoever of good cause for this
16 requested continuance of one date, the dispositive motions deadline (only as applied to them),
17 chosen from among many dates in this court's scheduling order.

18 Crary does not argue that no change should be made. Rather, Crary submits that, when it is
19 still unclear what role in this case third party defendant's will play (and even who will be
20 representing them) it makes much more sense to continue the trial date and all dates flowing
21 therefore, rather than cherry picking one date which may or may not disadvantage all parties to this
22 action, including even third party defendants on whose behalf this motion is purportedly brought.

23 Crary doubts that Jones' insurance panel counsel, who contacted Crary's counsel, has been
24 informed about the refusal by plaintiff's/third party defendant's counsel to continue the trial date
25 and discovery cutoff date.

26 Additionally, it is not in the best interests of judicial economy to move only one party's
27 dispositive motions deadline. Crary is seriously considering bringing his own dispositive motion.
28

1 All such motions should be brought together so that all allegedly uncontested facts can be reviewed
2 and agreed upon or contested at one time in connection with all such motions. It only makes sense
3 that, if one party claims summary judgment, all such claims alleging uncontested facts should be
4 heard concurrently.

5 And third party defendant's here do not even propose when such dispositive motions for
6 them should be heard. They just request a continuance "until such time," as the court has ruled on
7 their motion to dismiss. It only makes sense that the court should be able to fully consider third
8 party defendant's motion and Crary's opposition, and a trial date and discovery cutoff date should
9 follow in such reasonable time as to allow all parties the ability to fully prepare for trial and for all
10 deadlines flowing therefrom.

11 Clearly, the scheduling order may be modified in this matter by the court. Crary submits that
12 the entire scheduling order, and not just the one date chosen by temporary counsel, should be set so
13 as to give all parties adequate time to prepare this matter for trial.

14 For these reasons, Crary respectfully submits that, if any changes are to be made to the
15 current scheduling order, the trial date should be moved, a new scheduling order should be made,
16 and the discovery cutoff and dispositive motions deadlines should be moved therewith.

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19
20 ~~Stephen R. Felson (0038432)~~
21 ~~36 E. Seventh Street~~
22 ~~Suite 1650~~
23 ~~Cincinnati, Ohio 45202~~
24 ~~Telephone: (513) 721-2500~~
25 ~~Facsimile: (513) 721-1120~~

26 *Paul David Marotta*
27 Paul David Marotta, California State Bar No. 111812
28 Jennifer Chen, California State Bar No. 205264
THE CORPORATE LAW GROUP
500 Airport Boulevard, Suite 120
Burlingame, CA 94010
Telephone: (650) 227-8000
Facsimile: (650) 227-8001

CERTIFICATION OF SERVICE

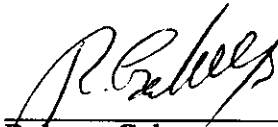
I hereby certify that the foregoing were served upon the following by ordinary U.S. Mail this 26th day of August 2003 addressed as follows:

Leonard Kristal (pro se)
620 North Third Street,
Aspen, Colorado 81611

Leonard Kristal
ldkristal@yahoo.com

Leonard Kristal
2116 East Thackery Street
West Covina, CA 91791

David M. Cook (0023469)
Stephen A. Simon (0068268)
David M. Cook, LLC
22 West Ninth Street
Cincinnati, Ohio 45202
Phone: (513) 721-7500
Fax: (513) 721-1178



Roberto Galvez
500 Airport Blvd., Suite 120
Burlingame, CA 94010
Telephone: (650) 227-8000
Facsimile: (650) 227-8001